IN THE

Supreme Court of the United States

No. [redacted] 70-5061

THOMAS KIRBY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

(On Writ Of Certiorari To The Appellate Court Of Illinois, First District)

BRIEF FOR RESPONDENT

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Printed by Authority of the State of Illinois — 3M5

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THOMAS KIRBY,

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VS.

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

Whether the right to counsel at eyewitness confrontations is applicable where the confrontation occurred during an investigatory stage of the case and prior to indictment, preliminary hearing and the retention or appointment of counsel.

Whether the decisions of *United States* v. *Wade* and *Gilbert* v. *California* should be overruled to the extent that they hold that the right to counsel attaches to certain eyewitness indentification procedures.

STATEMENT OF FACTS

Thomas Kirby and Ralph Bean were indicted for the offense of robbery by a Cook County, Illinois Grand Jury. They were jointly tried by a jury and found guilty. Kirby was sentenced to the Illinois State Penitentiary for a term of not less than five nor more than twelve years. On appeal the appellate court affirmed, and thereafter the Supreme Court of Illinois denied Kirby's petition for leave to appeal. This Court granted a writ of certiorari on May 24, 1971 (A. 1-3).

Prior to trial, the two defendants filed motions to suppress physical evidence and motions to suppress identification testimony of a witness (A. 1). The motions to suppress identification testimony alleged that the identification was induced by the action of the police and that the defendant was not advised of his right to have counsel present.

A pre-trial evidentiary hearing was conducted by the court. Kirby's co-defendant, Ralph Bean, testified with regard to the motion to suppress physical evidence that on February 22, 1968, he and Kirby were stopped by two police officers as they were walking in the area of 2200 West Madison Street. They asked him for some identification, which he gave them, and they returned it to him. At the time the officers did not show him an arrest warrant. After the officers questioned Kirby, they told the two of them to get into their police car. They also took his identification from his pocket. (A. 5-6) The identification did not have Bean's name on it; it bore the name of Willie Shard.

As to the motion to suppress identification teestimony, Bean testified that the police officers did not inform him

that he had a right to have an attorney present prior to being identified.

During the hearing on the motion to suppress physical evidence, Kirby testified that they were stopped by the police in the area of 2200 West Madison Street on February 22, 1968, and asked to identify themselves. The police neither told them that they had an arrest warwarant nor said they had seen them commit a crime. After they were stopped, they were searched by the police. (A. 8)

Kirby further testified during the identification phase of the hearing that after he was placed under arrest he was not advised that he had a right to have an attorney present prior to being identified. (A. 17)

The two arresting officers testified for the prosecution during the hearing on the motion to suppress physical evidence. The substance of their testimony was that while they were riding in their squad car, Officer James Rizzi remarked to his partner, Biaggio Panepinto, that one of the two defendants looked like a wanted suspect whose photo was printed in one of their police bulletins. They made a "U" turn, went back and stopped the two men. They inquired as to their identifications, and both men produced identification bearing the name Willie Shard. As Kirby was looking for his identification, Officer Panepinto observed traveler's checks bearing the name Willie Shard. At first Kirby said these were play money, then he said that he won the checks in a crap game. After asking for additional identification, the officer noticed a social security card with the name Willie Shard also in Kirby's possession. The other officer discovered a Blue Cross and Blue Shield membership card with the name Willie Shard, a receipt from a Greyhound

bus ticket, a prescription card from a drug store and a duplicate social security card with the name Willie Shard in the possession of Bean. The two men were then placed under arrest and transported to the police station. (A. 9-16)

The prosecution offered no further evidence during the identification phase of the hearing. Upon the conclusion of the evidence, the judge granted the motion to suppress the physical evidence as to the items taken from the defendant Bean but denied the other motions to suppress.

During the trial on the merits, Willie Shard testified that on February 20, 1968, at about 4:30 in the afternoon, he was walking on Hoyne Street between Warren and Madison. He was coming from a Greyhound Bus Station, having returned from a trip to New Orleans. (A. 18, 22). As he was walking, he looked back and saw two men coming down the street — they were about fifteen feet away. (A. 18) At the time it was light out and he saw them well. (A. 19)

As he was about to step into a restaurant, one of the men ran up and grabbed him around the neck. Both men reached into his pockets and took everything he had including $140 in traveler's checks, about thirty dollars in cash, his wallet and his identification cards. (A. 19) The two men then fled in the direction of Madison Street. Shard said that he observed the men before, during and after the robbery. (A. 27-8)

The following day he went to a police station and made a report of the robbery. He gave the police physical descriptions of the two men. (A. 20, 21, 23)

On February 22, 1968, he was taken by two police officers to the Maxwell Street Police Station. When they picked him up, they asked if he had been robbed—he said yes—and if he could make an identification—he again said yes. After they arived at the station, he saw the two defendants sitting at a desk and he pointed them out. (A. 24)

Shard identified the defendants in the courtroom and also the property that was taken from Kirby at the time of the arrest.

The arresting officers in addition to testifying as to those events recounted during the hearing on the motion to suppress, testified that after transporting Shard to the station, they learned that there was a complaint that checks had been taken during a robbery of one Willie Shard. The two arrestees were detained in the squad room of the station house. About two hours later, Shard entered and said, "Those are the two men that robbed me." They did not prompt or coach him. (A. 31)

Ralph Bean, the co-defendant, testified that he and Kirby found the checks and identification in an alley in the vicinity of where they were arrested about two hours earlier. They had stepped into the alley to take a drink of whiskey. (A. 38, 39, 43, 44)

After they were arrested they were taken to the police station. Later Shard came to the station. Bean saw him standing by the doorway looking around. Someone brought Shard over to the table where they were sitting. He heard Shard say, "I don't know," or, "I told you I can't identify," or, "something like that." (A. 89)

Bean said that he never saw Shard before and that he didn't take anything from him.

In rebuttal Officer Harold Marsicek testified that he and his partner picked up Shard on February 22, 1968, and drove him to the police station. As they entered the squadroom, Shard pointed across the room at Kirby and Bean and said, "Those are the two men that robbed me." (A. 46, 47). Prior to this they had said nothing to Shard.

SUMMARY OF ARGUMENT

The courts have generally refused to hold that the right to counsel applies to all eyewitness confrontations, holding that confrontations occurring shortly after the crime, accidential confrontations, confrontations involving suspects not in custody and photographic confrontations are all exempt from the right to counsel. Under the facts of this case, the right to counsel would have to be extended to cover all cases of police arranged confrontations involving the corporeal presence of the suspect which confrontations did not occur within minutes of the crime before the right to counsel would apply herein. The petitioner here was confronted prior to formal filing of charges and preliminary hearing as well as prior to indictment. Petitioner had neither retained nor been appointed counsel when he was confronted, and the confrontation occurred within 48 hours of the crime and a couple of hours after arrest. It has also been held that confrontations which are investigatory and not accusatory do not give rise to a right to counsel. In this case, the confrontation was investigatory.

The lower courts have split on the issue of applying right to counsel to pre-indictment lineups. However, the express language of this Court's opinions makes it clear that this Court has held only that the right to counsel applies to post-indictment lineups. Petitioner seeks to have this holding broadened. There are strong reasons not to broaden the right to counsel at confrontations. Post-

indictment lineups are almost certainly not investigatory since they occur after the government has committed itself to prosecute. At post-indictment proceedings the defendant will have his own counsel familiar with the case and able to assist his client to the best of his ability. Pre-indictment lineups may well be investigatory and the government is not committed to prosecute. The suspect may well have no counsel of his own and, even if a quickly appointed or substitute counsel is present, such counsel will be unacquainted with the case and will not be able to remedy this defect without causing serious delay of the lineup. Finally, the bar has neither the personnel capacity to fullfill the obligations of attending pre-indictment lineups.

The "critical stage" reasoning leading to imposition of the right to counsel at lineups is faulty. It defines as a "critical stage" any event where counsel's absence, in effect, might jeopardize the accused's interest in the reliability of the fact finding process. The rationale, which is a departure from past "critical stage" thinking, carries much too far. It would literally require the presence of counsel at every stage of the police investigation of a crime. The rationale would require the presence of counsel at every police or prosecution interview with a witness even those occuring before the suspect is apprehended. The rationale is inconsistent with all the decisions exempting prompt, accidental and photographic confrontations from the right to counsel. Furthermore, there is no evidence that examination by counsel will not elicit facts concerning pre-trial confrontations just as it elicits the far more important facts concerning the circumstances of the crime. Nor is there evidence that deliberate abuse of the confrontation procedure will be prevented by the presence of counsel.

Lastly, counsel is ineffective at lineups. Counsel has no special capacity to regulate confrontations. Even if he had the capacity to do so, he is given no authority to order the police to follow certain procedures. And even if counsel has both the capacity and authority to regulate confrontations, he has no duty to see that they are fair. It is counsel's duty to weight the confrontation unfairly in favor of his client. In many cases, counsel will not object to an unfair confrontation for fear it will be corrected and his client will lose a chance to suppress evidence. Counsel's role is essentially that of a witness. He is not well qualified to play this role. He is subject to the inherent limitation that much which may potentially prejudice his client, e.g. police suggestion to the witness before the confrontation, or the vindictiveness of a victim, cannot be "witnessed" by him. He is subject to the limitations of the cannons of ethics barring him as a witness. In one jurisdiction where the procedure has been studied in actual practice, defense counsel believe that they have no meaningful function, and there is evidence that the confrontation is converted into a forum for discovery and witness intimidation. In some cases, the suspect's appearance has been altered between the offense and the lineup. Counsel is not an effective witness for his client since he is not neutral. More importantly, if counsel succeeds in securing a fair lineup for his client and an identification is made, counsel may become a witness for the prosecution where identification is contested. The testimony, or even the possibility of testimony by counsel against client must destroy any relationship of trust. The grafting of a right to counsel into eyewitness identification procedures was a misstep by this Court. If the problems of suggestive and improper identification procedures are severe, then they can be dealt with through the Due Process Clause. The creation of a right to counsel does not meet those problems.

ARGUMENT

I.

THE RIGHT TO COUNSEL ARISING WHEN AN EYEWITNESS VIEWS A SUSPECT SHOULD BE APPLICABLE ONLY TO POST-INDICTMENT CONFRONTATIONS AND, IN ANY EVENT, SHOULD NOT APPLY TO THE INVESTIGATORY CONFRONTATION IN THIS CASE.

A.

The Right To Counsel At Eyewitness Confrontations: General Rules Of Application And Exception.

The right to counsel at lineups or other identification proceedings may be governed by several measures of application and exception.

There is no court which has held that the right to counsel is applicable to all occasions when an eyewitness sees a suspect. The courts have developed at least five generally recognized exceptions to any blanket imposition of the right to counsel:

(a) The right to counsel does not apply when the suspect is not in custody. *United States* v. *Cox,* 428 F. 2d 683, (7th Cir. 1970) *cert. den.* 400 U.S. 881, *Bratten* v. *Delaware,* 307 F. Supp. 643 (Del. 1969); *Bradford* v. *State,* 118 Ga. App. 457, 164 S.E. 2d 264, *cert. den.* 394 U.S. 1020 (1968); *People* v. *Cezarz,* 44 Ill. 2d 180, 255 N.E. 2d 1 (1969); *State* v. *Bibbs,* 461 S.W. 2d 755 (Mo. 1970); *State* v. *Moore,* 111 N.J. Super 528, 269 A. 2d 534

(1970); *State* v. *Clark,* 2 Wash. App. 2d 45, 467 P. 2d 369 (1970).[1]

(b) The right on counsel does not apply to accidental confrontations, i.e., those not deliberately arranged by the police. *United States* v. *Pollack,* 427 F. 2d 1168 (5th Cir. 1970) *cert. den.* 400 U.S. 831; *People* v. *Martin,* 47 Ill. 2d 331, 265 N.E. 2d 685 (1970); *Commonwealth* v. *D'Ambra,* 70 Mass. Adv. Sh. 513, 258 N.E. 2d 74 (1970); *State* v. *Bibbs,* 461 S.W. 2d 755 (Mo. 1970); *State* v. *Turner,* 81 N.M. 571, 469 P. 2d 720 (N.M. App. 1970); *State* v. *Dutton,* 112 N.J. Super. 402, 271 A. 2d 593 (1970).[2]

(c) The right to counsel does not apply to confrontations occuring shortly after the crime. *Russell* v. *United States,* 408 F. 2d 1280 (D.C. Cir. 1969) *cert. den.* 395 U.S. 428; *United States* v. *Davis,* 399 F. 2d 948 (2nd Cir. 1968) *cert. den.* 393 U.S. 987; *State* v. *Boens,* 8 Ariz. App. 110, 443 P. 2d 925 (1968); *State* v. *Bratten,* 245 A. 2d 556 (Del. Super. 1968); *Robinson* v. *State,* 237 So. 2d 268 (Fla. App. 1970); *People* v. *Bazzelle,* 264 N.E. 2d 457 (Ill. App. 1970) *cert. pndg.,* —— U.S. ——; *Parker* v. *State,* 261 N.E. 2d 562 (Ind. 1970); *Jones* v. *State,* 255 N.E. 2d 219 (Ind. 1970); *State* v. *Smith,* 182 N.W. 2d 409 (Iowa 1970); *State* v. *Meeks,* 205 Kan. 261, 469 P. 2d 302 (1970);

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1. The best illustration of a non-custodial confrontation is that in People v. Cezarz, 44 Ill. 2d 180, 255 N.E. 2d 1 (1969), where the witness was taken to a motel swimming pool, and identified his assailant, who was a guest of the motel, from a large group of people using the pool.

2. The rationale of these exceptions rests upon the absence of police misconduct and upon the absence of suggestiveness whenever the confrontation is truly accidental.

State v. *Lewis,* 255 La. 134, 229 So. 2d 726 (1969); *State* v. *Richey,* 258 La. ——, 249 So. 2d 143 (1971); *Commonwealth* v. *Connolly,* 356 Mass. 617, 255 N.E. 2d 191, *cert. den.* 400 U.S. 843 (1970); *State* v. *Satterfield,* 103 N.J. Super. 291, 247 A. 2d 144 (1968); *Grant* v. *State,* 446 S.W. 2d 620 (Mo. 1969); *State* v. *Hamblin,* 448 S.W. 2d 755 (Mo. 1970); *State* v. *Tounes,* 461 S.W. 2d 761 (Mo. 1970); *State* v. *Madden,* 89 Ore. Adv. Sh. 747, 461 P. 2d 834 (Ore. App. 1969).

(d) The right to counsel does not apply to confrontations involving the use of photographs of the suspect. *United States* v. *Ballard,* 423 F. 2d 127 (5th Cir. 1970); *United States* v. *Hamilton,* 420 F. 2d 1292 (D.C. Cir. 1969); *United States* v. *Bennett,* 409 F. 2d 888 (2nd Cir. 1969) *cert. den.* 396 U.S. 852; *United States* v. *Collins,* 416 F. 2d 696 (4th Cir. 1969), *cert. den.* 396 U.S. 102; *McGee* v. *United States,* 402 F. 2d 434 (10th Cir. 1968), *cert. den.* 394 U.S. 908; *People* v. *Adair,* 2 Cal. App. 3d 92, 82 Cal. Rep. 460 (1969); *People* v. *Hawkins,* 7 Cal. App. 3d 117, 86 Cal. Rep. 428 (1970); *People* v. *Stuller,* 10 Cal. App. 3d 582, 89 Cal. Rep. 158 (1970) *cert. den.* 401 U.S. 977; *Jenkins* v. *State,* 228 So. 2d 114 (Fla. App. 1969); *People* v. *Wooley,* 127 Ill. App. 2d 249, 262 N.E. 2d 237 (1970); *People* v. *Piscunere,* 26 Mich. App. 52, 181 N.W. 2d 782 (1970); *State* v. *Randolph,* 186 Neb. 297, 183 N.W. 2d 225 (1971); *People* v. *Gonzales,* 27 N.Y. 2d 53, 261 N.E. 2d 605 (1970), *cert. den.* 400 U.S. 996; *People* v. *Coles,* 34 App. Div. 2d 1051, 312 N.Y.S. 2d 621 (1970); *State* v. *McVay,* 277 N.C. 410, 177 S.E. 2d 874 (1970); *State* v. *Grays,* 1 Wash. App. 422, 463 P. 2d 183 (1969); *State* v. *Cerny,* 78 Wash. 2d 871 (1971); *Kain* v. *State,* 48 Wis. 2d 212, 179 N.W. 2d 777 (1970).

Some courts have indicated that the right to counsel at photographic identification procedures does exist if the

defendant is in custody. *Thompson* v. *State*, 85 Nev. 134, 451 P. 2d 704 (1969) *cert. den.* 396 U.S. 893; *Commonwealth* v. *Whitney*, 439 Pa. 205, 266 A. 2d 738 (1970) *cert. den.* 400 U.S. 919; *United States* v. *Zeiler*, 427 F. 2d 1305 (3rd Cir. 1970). However, most courts do not follow this rule. See, *United States* v. *Conway*, 415 F. 2d 158 (3rd Cir. 1969) *cert. den.* 397 U.S. 994; *United States* v. *Marsen*, 408 F. 2d 644 (4th Cir. 1968), *cert. den.* 393 U.S. 1056; *Allen* v. *Rhay*, 431 F. 2d 1160 (9th Cir. 1970); *United States* v. *Williams*, 436 F. 2d 1166 (9th Cir. 1970) *cert. den.* 402 U.S. 912; *United States* v. *Serio*, 440 F. 2d 827 (6th Cir. 1971); *United States* v. *Fowler*, 439 F. 2d 133 (9th Cir. 1971); *People* v. *Lawrence*, 4 Cal. 3d 373, 481 P. 2d 212 (1971); *People* v. *Holiday*, 47 Ill. 2d 300, 265 N.E. 2d 634 (1970).

In addition to the various exceptions recognized by the courts, there are, at least in theory, five general rules which might be thought to govern the non-exceptional cases.

First, the right to counsel may apply to all cases in which the suspect is in custody.

Second, the right to counsel may apply to all cases in which the confrontation is accusatory rather than investigatory. This theory resurrects the *Escobedo* concept of focus and would require counsel whenever the state of mind of the police is such that they think the suspect committed the crime and are seeking eyewitness *confirmation* of their pre-existing beliefs. See *United States* v. *Davis*, 399 F. 2d 952 (2nd Cir. 1968).

Third, the right to counsel may apply only after formal charges are filed in court or after preliminary hearing.

Fourth, the right to counsel applies only after indictment.

Fifth, the right to counsel may apply after the retention or appointment of counsel.[3]

In this case, application of any of the general rules, excepting the first, would render the right to counsel inapplicable. Obviously, petitioner here had neither retained nor appointed counsel at the time of the confrontation. Charges had not been filed nor had preliminary hearing been held. Certainly, petitioner was not under indictment. The record also demonstrates that the confrontation was investigatory in nature.

Thomas Kirby was stopped by the police because he resembled a wanted suspect. See *Hill* v. *California*, 401 U.S. 797 (1971). In the course of checking into Kirby's identity, the investigating officers noted that Kirby had in his possession someone else's identification and traveler's checks. Kirby gave false and conflicting explanations as to how he had acquired the property. The investigating officers then placed Kirby under arrest and transported him to the police station. At the time the officers had no knowledge about the robbery itself.

Although the arresting officers had reason to suspect Kirby and to place him under arrest, still, they had no

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3. It should be noted that this fifth rule would today be roughly equivalent to the second rule since Coleman v. Alabama, 399 U.S. 1 (1970), requires the appointment of counsel at preliminary hearing. It should also be noted that under the new Illinois Constitution (effective July 1, 1971) the prosecution cannot, except in a small class of cases, avoid giving a preliminary hearing by indicting before the hearing. See Ill. Const. Article I, Sec. 7.

knowledge on which to base an accusation of robbery. Sometime after arriving at the station the arresting officers learned that the checks had been taken during a robbery from Willie Shard (A. 31). The record does not indicate that the arresting officers had any additional information concerning the details of the robbery. Officer Panepinto testified that he did not see the police report about the robbery until sometime later (A. 36). The arresting officers were not from the Robbery Unit, but were attached to the Public Vehicle Unit (A. 10, 14). According to the testimony of Ralph Bean, the codefendant, the officers did not accuse them of the robbery until after Shard appeared at the station (A. 40-41). The record does not show that any booking procedures had commenced prior to that time.

Kirby and Bean were not taken to the police station to be identified since the arresting officers were not then aware of the robbery. Clearly then, the purpose was to further investigate concerning the ownership of the property. The arrest itself should not be regarded as a stage of the prosecution at which the right to counsel arises. Were this so, prompt confrontations would be impermissable unless the suspect were not under arrest. Nor is there any justification for such a conclusion. As the court said in *United States* v. *Davis*, 399 F. 2d 948, 951-52 (2nd Cir. 1968):

> "We do not read Wade and its siblings as saying that the mere fact of custody, especially when this is for an unrelated crime, automatically triggers the Sixth Amendment right to counsel, as it would the Fifth Amendment privilege against self-incrimation. The importance of custody from a Fifth Amendment standpoint is that it is conceived as furnishing the element of compulsion which that Amendment de-

mands, see Miranda v. State of Arizona, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The protection of the Sixth Amendment applies to 'the accused' in 'all criminal prosecutions,' and while Wade makes clear that this includes certain pretrial proceedings, 388 U.S. at 224-225, 87 S. Ct. 1926, that is a long way from saying that the protection attaches as soon as suspicion is aroused. The fact of custody adds little of Sixth Amendment relevance, especially when, as here, this is for an unrelated crime."

Nor does it follow that because the officers subsequently learned that a person named Willie Shard had reported that he had been robbed of some traveler's checks the previous day, everything that ensued from that point on was a part of the prosecution requiring the presence of counsel. No accusations had yet been made, and the arresting officers had little opportunity to learn sufficient details to make any accusations without consulting with Shard. In this respect there is little difference between the confrontation that occurred here and those approved under the prompt confrontation exception. Under the circumstances, it does not follow that the proceedings had reached the accusatory stage or that Shard should not have been allowed to see the suspects in the absence of defense counsel.

B.

The Right To Counsel At Eyewitness Confrontations: The Post Indictment Rule.

It is our contention that under existing law the right to counsel should, as a general rule, apply only to eyewitness confrontations occurring after indictment. Any broader rule would represent an extension of the holdings in *United States* v. *Wade,* 388 U.S. 218 (1967)

and *Gilbert* v. *California*, 388 U.S. 263 (1967), and any extension would be unjustified in either law or policy.

The issue of the applicability of *Wade* and *Gilbert* to pre-indictment confrontations has severely divided the lower courts.[4]

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4. Arizona, Florida, Illinois, Missouri and Virginia have rejected the application of the right of counsel to pre-indictment cases. See State v. Fields, 104 Ariz. 486, 455 P. 2d 964, 965-66 (1969); Perkins v. State, 228 So. 2d 382, 389-90 (Fla. 1969); People v. Palmer, 41 Ill. 2d 571, 244 N.E. 2d 173-75 (1969); State v. Walters, 457 S.W. 2d 817 (Mo. 1970); State v. Crossman, 464 S.W. 2d 36, 40 (Mo. 1970); Buchanan v. Commonwealth, 210 Va. 664, 173 S.E. 2d 792 (1970). So too, seemingly, has Montana, State v. Borchert, 156 Mont. —, 479 P. 2d 454, 455-56 (1971). Maine has adopted the doctrine in an alternative holding. See Trask v. State, 247 A. 2d 114, 116-17 (Me. 1968).

Kansas and New Jersey have acknowledged the issue but have not decided it. See State v. Griffin, 205 Kan. 370, 469 P. 2d 417, 420 (1970); State v. Satterfield, 103 N.J. Super. 291, 247 A. 2d 145 (1968); State v. Moore, 111 N.J. Super. 528, 269 A. 2d 534, 536-37 (1970); State v. Matlack, 49 N.J. 491, 499, 231 A. 2d 369, 373, cert. den. 389 U.S. 1009 (1967).

California, Maryland, Michigan, Ohio, Pennsylvania, Rhode Island and Wisconsin have decided that the right to counsel at lineup applies prior to indictment. See People v. Fowler, 1 Cal. 3d 335, 461 P. 2d 643 (1969); Palmer v. State, 5 Md. App. 691, 249 A. 2d 482, 486 (1969); People v. Hutton, 21 Mich. App. 312, 175 N.W. 2d 860 (1970), (conceding, however, that the *holdings* of Wade and Gilbert apply only to post-indictment cases); State v. Isaacs, 24 Ohio App. 2d 115, 265 N.E. 2d 327 (1970); Commonwealth v. Whitney, 349 Pa. 205, 266 A. 2d 738 (1970), cert. den. 400 U.S. 919 (1970); In re

The language of this Court in *Wade* clearly supports the contention that the holdings in those cases apply only to post-indictment lineups. In *Wade* this Court characterized the issue as "whether courtroom identifications

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Holley, 268 A. 2d 723 (R.I. 1970); Hayes v. State, 46 Wis. 2d 93, 175 N.W. 2d 625 (1970); Accord Commonwealth v. Guillory, 356 Mass. 591, 254 N.E. 2d 427, 429 (1969). Several other courts have assumed that the right to counsel applies prior to indictment. See State v. Singleton, 253 La. 18, 215 So. 2d 838, 841-42 (1968); Thompson v. State, 85 Nev. 134, 451 P. 2d 704 (1969), cert. den. 396 U.S. 893; State v. Wright, 274 N.C. 84, 161 S.E. 2d 581, 587 (1968), cert. den. 396 U.S. 934; Martinez v. State, 437 S.W. 2d 842, 845-46 (Texas 1969); State v. Hicks, 76 Wash. 2d 80, 455 P. 2d 943 (1969).

The federal courts of appeal have also dealt with the question. The Third, Fifth and D.C. Circuits have explicitly rejected any limitation of the right to counsel in post-indictment cases. See Virgin Islands v. Callwood 440 F. 2d 1206, 1207 (3rd Cir. 1971); Long v. United States, 424 F. 2d 799 (D.C. Cir. 1969); Rivers v. United States, 400 F. 2d 935, 937-42 (5th Cir. 1968) (The opinion in Rivers concerned a confrontation occurring shortly after the crime and the Fifth Circuit's application of Wade to the facts before it seems clearly incorrect). The First, Second and Seventh Circuits have assumed implicitly that Wade applies to pre-indictment confrontations. See Cooper v. Picard, 428 F. 2d 1351 (1st Cir. 1970). United States v. Ayers 426 F. 2d 524, 526 (2nd Cir. 1970) cert. den. 400 U.S. 842; United States v. Broadhead, 413 F. 2d 1351, 1354 (7th Cir. 1969) cert. den 396 U.S. 964. The Ninth Circuit has applied Wade to pre-indictment confrontations but has done so on a case by case basis. United States v. Phillips, 427 F. 2d 1035 (9th Cir. 1970) cert. den. 400 U.S. 867 ("for the purpose of this case, we draw no distinction between a pre-indictment and post-indictment lineup" 427 F. 2d at 1037, n. 1).

of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel." *United States* v. *Wade*, 388 U.S. at 219. More importantly, this Court itself has on two occasions commented directly on the nature of the *Wade* holding.

In *Gilbert* this Court said of *Wade*, "We there held that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth Amendment right to counsel . . ." *Gilbert* v. *California*, 388 U.S. at 272. And in *Simmons* v. *United States*, 390 U.S. 377 (1968) the Court said of *Wade* and *Gilbert*, that "The rationale of those cases was that an accused is entitled to counsel at any 'critical stage of the prosecution' and that a post-indictment lineup is such a 'critical stage'." 390 U.S. at 382-83.

Those courts which have ruled that *Wade* and *Gilbert* apply to pre-indictment confrontations have relied heavily on the language of *Wade* which stated, "In sum, the principle of *Powell* v. *Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of counsel is necessary." It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *United States* v. *Wade*, 388 U.S. at 227. This language, however, does not describe the holding of the case. It merely establishes that all

pretrial confrontations are subject to scrutiny by the Court for the purpose of determining whether counsel is required; it does not hold that all pretrial confrontations require counsel. In short, the quoted language defines the scope of the Court's power of inquiry, it does not set forth the results or conclusions of that inquiry.[5]

The courts which have extended *Wade-Gilbert* to pre-indictment confrontations have also relied heavily on the premise that the problems that may exist in post-indictment lineups may also exist in pre-indictment lineups. Assuming the truth of this premise, there is still no justification for assuming that the right to counsel is as appropriate a remedy in a pre-indictment lineup as it is in a post-indictment lineup. Indeed, no court has examined carefully the nature of the remedy in relation to the problems it was designed to solve. Indeed, in the leading case extending the right to counsel, the court expressly stated, "we do not address ourselves in this case to the difficult and perplexing problems which can be expected to arise relative to the role to be played by counsel in the actual line-up process. . . . We assume that counsel's function and role at the lineup itself will be determined in future cases. . . ." *People* v. *Fowler*, 1 Cal. 3d 335, 461 P. 2d at 654, n. 19.

The extension of the right to counsel by the lower courts has not been caused by any detailed analysis of

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5. Those who seek to read the quoted language as part of the holding must resolve the anomaly that it narrows the generally accepted proposition that there is an absolute right to counsel at post-indictment lineups since the language would require the examination of the facts of each "particular confrontation," pre- and post-indictment, to determine whether counsel is required.

the rationale of *Wade-Gilbert.*[6] No court has offered any consistent theory of justification for its extension of *Wade.* We submit that the reason for these decisions is the view of many courts that this Court simply does not mean what it says. The lower courts, in essence, rule not on the basis of existing precedent, but on the basis of their intuition as to what precedent will someday be.

The same sort of intuition moved several courts to hold that *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), required warnings of constitutional rights prior to interrogation despite clear language in that opinion limiting the holding. When this Court did require such warnings in *Miranda* v. *Arizona;* 384 U.S. 436 (1966), it did not do so on the basis of *Escobedo.* In *Miranda* this Court was dealing with a new question for which it offered a new and very extensive rationale. The Court explicitly recognized the difference between *Escobedo* and *Miranda,* in *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). Finally, the Court explicitly affirmed those courts which read the language in *Escobedo* to mean what it said. See *Frazier* v. *Cupp,* 394 U.S. 731 (1969).

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6. The right to counsel at interrogation does, of course, apply prior to indictment. There is a difference between interrogation and lineup cases. In the former cases, the defendant has a clear choice as to whether or not to participate in interrogation and the degree to which he will participate. The broad range of choice present may be said to require that the suspect have the opportunity to consult counsel if he so desires. In lineup cases the defendant exercises no options — he must participate in the lineup. The only purpose counsel serves is to witness the lineup, and this function is not so vital as to require a pre-indictment right to counsel.

In sum, the right to counsel at pre-indictment confrontations is *not* required by *Wade*. The petitioner here cannot properly claim that his rights under *Wade* were violated. His claim is that the existing right to counsel should be expanded to cover his case.

In *Wade* and *Gilbert*, the lineups occurred after indictment. Both defendants had counsel. The appointment of counsel upon indictment is virtually automatic in this country. In *Wade* and *Gilbert* defense counsel both had adequate time to interview their clients. They were in a position to gauge the significance and the likelihood of eyewitness identification. To the extent possible they would be able to render competent assistance to their clients at the lineup without causing delay of the lineup. Finally, the post-indictment lineup has no purpose other than the gathering of evidence against a person whom the government is essentially committed to prosecute. Surely, whatever incentive there is to abuse the identification process is likely to exist largely in cases where the government is committed to prosecute. Under these circumstances, when the adversary process has clearly commenced, the right to counsel might be appropriate.

Where there is no indictment, where the government is not committed to prosecution, the right to counsel is far less appropriate. Where, in addition, defendant has no counsel and the securing of counsel will cause delay, there is still less reason to insist upon a right to counsel. Even if counsel is available, he will necessarily have little, if any, knowledge of the case against his client and will be far from able to advise or assist his client to the best of his ability. Under these circumstances, counsel serves no essential purpose.

There is, furthermore, a substantial difference in the capacity of the bar to meet the obligations of the right to counsel in post-indictment lineups and its capacity to attend all lineups. It has been stated, "The cost of assigning counsel for untold numbers of pre-trial identification proceedings may be so excessive as to prohibit such proceedings entirely. . . . The mandatory presence of counsel at pre-trial identifications would also prove uneconomical for the lawyers themselves, who will not be eager to perform these time-consuming tasks, far removed from the courtroom, and demanding little or no legal skills." Note, Right To Counsel At Pre-Trial Lineup, 63 Nw. L. Rev. 251, 260 (1968); Read, Lawyers At Lineups: Constitutional Necessity or Avoidable Extravagance, 17 U.C.L.A. L. Rev. 339, 378 (1969).

Indeed, the language of the *Wade* opinion envisions its application as limited at least to cases where the defendant has his own counsel.[7] At least until *Coleman* v. *Alabama*, 399 U.S. 1 (1970), many defendants, if not most, did not have their own counsel until they were arraigned after indictment.

The return of an indictment represents more than a meaningless formality. It represents the government's firm decision to proceed against an individual. It solidifies the adverse positions of the parties. It is, in the con-

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7. The language in question involved the discussion of the undecided question as to the permissibility of substitute counsel "where notification and presence of the suspect's own counsel would result in prejudicial delay." United States v. Wade, 388 U.S. at 237. Certainly, substitute counsel is of little value unless he can consult with defendant's regular counsel who knows the facts of the case.

text of lineup cases, a valid point of distinction for the attachment of the right to counsel. Cf. *Massiah* v. *United States*, 377 U.S. 201 (1964).

More significantly, it is our view that counsel at a lineup has so little value that extension of the right to counsel to pre-indictment lineups is completely unjustified. This argument, however, goes to the very validity of *Wade* and *Gilbert* as precedent. Accordingly, we contend in Point II that *Wade* and *Gilbert* ought to be overruled.[8]

II.

THE DOCTRINE THAT THE RIGHT TO COUNSEL ATTACHES AT EYEWITNESS CONFRONTATIONS SHOULD BE REJECTED AND UNITED STATES v. WADE SHOULD BE OVERRULED.

Prior to the decision in *United States* v. *Wade*, 388 U.S. 218 (1967), the concept of a right to counsel at a lineup had been rejected. Eg. *Williams* v. *United States*, 345 F. 2d 733, 734-37 (D.C. Cir. 1965) (Burger, J. concurring). See *Stovall* v. *Denno*, 388 U.S. 293, 300 (1967).

In *Wade*, however, this Court applied the concept of the "critical stage" to lineups. The Court said that the right

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8. The question of overruling could not have been raised below. It is only this Court that can consider the question of overruling its own precedent. Furthermore, the failure to raise a reason or ground for sustaining judgment in the lower court does not prevent an appellee or respondent from raising any ground to defend a judgment in review. "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment. . . ." Dandridge v. Williams, 397 U.S. 471, 475 n. 6 (1970).

to counsel must arise at any event "where counsel's absence might derogate from the accused's right to a fair trial." *United States* v. *Wade,* 388 U.S. at 226. A lineup was such an event because it was "peculiarly riddled with innumerable dangers and variable factors". *United States* v. *Wade,* 388 U.S. at 235. Since counsel might serve to prevent such dangers, a suspect had the right to counsel at the lineup.

A.

The "Critical Stage" Theory of Wade.

The "critical stage" reasoning in *Wade* was an extension of prior theory that provided counsel in order to protect clearly declared rights, e.g., the right to raise defenses [9] and the privilege against self-incrimination.[10] This theory cannot apply to the lineup because the suspect has no right to refuse to appear in a lineup. In Wade the Court held that "neither the lineup itself nor anything that Wade was required to do in the lineup violated his privilege against self-incrimination." *United States* v. *Wade,* 388 U.S. at 221. Instead of protection of legal rights, the Court was concerned with the reliability of the fact-finding process. The emphasis on reliability is seen both in the Court's comments on the dangers of mistaken identification (*United States* v. *Wade,* 388 U.S. at 228-29, 232-33) and in the exemption from the right to counsel for scientific testing procedures (*Gilbert* v. *California,* 388 U.S. at 266-67).

This new reliability criterion for applying the "critical stage" concept is far too broad. If any stage where

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9. Hamilton v. Alabama, 368 U.S. 52 (1961).

10. Miranda v. Arizona, 384 U.S. 436 (1966).

the reliability of the fact-finding process is endangered is critical, the right to counsel should be required whenever his presence might reduce the danger of unreliable evidence. Literally, counsel would be required at every step of police investigation except in those few instances involving scientific testing.

The consistent course of interpretation of *Wade* by the lower courts has been at odds with the critical stage rationale of the opinion, and this includes those courts which reject the distinction between pre- and post-indictment lineups. A prompt confrontation soon after a crime is no less critical than any other confrontation in the sense that the word "critical" is used in *Wade*. Nor is a photographic display less critical.

Prompt confrontations cannot overcome the defendant's "inability effectively to reconstruct at trial any unfairness that occurred at the lineup." Prompt confrontations do not provide defense counsel with any better "opportunity meaningfully to attack the credibility of the witness' courtroom identification." In truth, prompt confrontations have no effect whatsoever on counsel's ability to confront the identification witness at trial. Yet with perhaps only one exception, courts of review have held that prompt confrontations do not violate *Wade*.

Photographs produced in court cannot assist counsel in searching out non-visual suggestive influences brought to bear on the witness when he was shown the pictures before trial. Whether the photographs produced in court are the same as those previously displayed to the witness depends almost entirely on the veracity of the police, since it is practically inconceivable that the witness would recall after any appreciable length of time any photographs other than the one he identified. The same potential for error

exists in photographic identifications as in corporeal identifications. This Court expressly recognized this fact in *Simmons* v. *United States*, 390 U.S. 377, 385 (1968):

> "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification."

And yet the vast majority of courts of review have held that the right to counsel as proclaimed in *Wade* does not extend to photographic identifications (See cases cited at Point I, A.).

The "critical stage" test as defined in *Wade* could equally apply to pre-arrest confrontations. There is nothing inherently different between pre- and post-arrest confrontations insofar as they affect counsel's ability to func-

tion at trial. As a practical matter, the effect of a pre-arrest confrontation is generally more adverse to the defendant because in many instances the witness views the suspect without the latter being aware of it. Hence, the defendant's ability to reconstruct the circumstances of the identification is impaired to a greater extent than if he were cognizant of that fact. Here again, however, the courts have declined to hold that pre-arrest confrontations are a critical stage of the prosecution (See cases cited at Point I, A.).

Other problems arise in attempting to apply the "critical stage" concept to other areas of pre-trial proceedings. For example, the argument has been made that counsel must be present when the prosecution is interrogating or preparing witnesses after the defendant has been placed under arrest. (See *United States* v. *Bennett*, 409 F. 2d 888, 898-900 (2nd Cir. 1969)). The argument is not without basis under the rationale expounded in *Wade*. In fact, one court accepted the argument and held that under very limited circumstances counsel was entitled to be present at an interview with the witnessess occurring immediately after a lineup at which counsel had been present. *People* v. *Williams*, 3 Cal. 3d 853, 478 P. 2d 942 (1971). A majority of courts, however, do not subscribe to this view. *United States* v. *Cunningham*, 423 F. 2d 1269 (4th Cir. 1970); *United States* v. *Bennett*, 409 F. 2d 888 (2nd Cir. 1969); *People* v. *Gonzalez*, 27 N.Y. 2d 53, 261 N.E. 2d 605 (1970), *cert. den.* 400 U.S. 996; *State* v. *Giragosian*, 270 A. 2d 921 (R.I. 1970).

One of the most critical stages of the proceedings prior to trial is the grand jury hearing. The same considerations apply to an assay of the consequences of the absence of counsel at the grand jury hearing as apply in the case

of preliminary hearings. (See *Coleman* v. *Alabama*, 399 U.S. 1, 9-10 (1970)). Skilled cross-examination of witnesses could expose weaknesses in the prosecution's case that could lead the grand jury to return a no-bill. The opportunity to examine the witnesses could better enable counsel to impeach a witness at trial. Counsel by his presence at the proceedings could more effectively discover the case that the prosecution has against his client. Thus it could be argued that the "critical stage" test requires that counsel be allowed to attend and participate at the grand jury proceedings. However, Rule 6(d) of the Federal Rules of Criminal Procedure prohibits defense counsel from attending the grand jury hearing, and the rule has been construed to bar the presence of defense counsel even in a case where the defendant was compelled to appear and testify before the grand jury "after suspicion had already focused on [him]." *Gollaher* v. *United States*, 419 F. 2d 520, 523-24 (9th Cir. 1969), *cert. den.* 396 U.S. 960.

As it stands, the "critical stage" test for determining when the right to counsel accrues is difficult to apply. Fidelity to the concept would require the attendance of counsel at virtually all proceedings, including those before the grand jury. Experience has shown that courts have rejected the concept, assigning such reasons for doing so as that the confrontation was prompt, the suspect was not in custody, the confrontation was accidental, and the identification was by photograph (even when the suspect was under arrest).

It might be said that the Court may limit the "critical stage" concept to those cases where the lawyer does not need firsthand knowledge of prior events in order to cross examine effectively the adverse witnesses, *United*

States v. *Wade*, 388 U.S. at 227-28. This limitation can be used to distinguish cases involving blood tests from those involving witnesses only if one assumes that the possibility of honest error is the only danger to be avoided. However, the prime concern of the Court in *Wade* was not honest error, but deliberate abuse. Most of the instances of improper lineups cited in *Wade* involved deliberate suggestiveness, and not honest error, *United States* v. *Wade*, 388 U.S. at 232-34. It is difficult to see how a lawyer can better expose a rigged blood test by cross-examination at trial than he can expose a rigged lineup by the same means.

The Court's assertion in *Wade* that cross-examination of witnesses will fail to convey an accurate idea of what occurred at the lineup is without support. The accused in most cases will be able to see and relate to counsel substantially all that occurred. And what can be hidden from the accused (e.g. peep-hole showup) can be hidden from counsel as well. There is, moreover, no reason to believe that either the police or the lay witnesses will not reveal all the circumstances of the identification. Neither the petitioner here, nor *Wade*, nor *Gilbert*, nor *Stovall* were prevented from reconstructing the circumstances of their confrontations simply because counsel was not present. Each of the cases cited by the Court in *Wade* as examples of improper confrontations involved records of trials held long before there was a right to counsel at lineups. Finally, the most important point of attack on any eyewitness involves his opportunity and ability to observe the criminal at the time of the crime. This most important circumstance can be reconstructed only by means of examining the witness. If we are to accept the capacity of direct and cross ex-

amination to illuminate those circumstances, we must accept the capacity of those same tools to illuminate the circumstances of a pre-trial confrontation.[11]

The "critical stage" rationale of *Wade* is not sound. It is a departure from traditional "critical stage" thinking. It is a doctrine without factual support. It is a theory without logical limits. It should be rejected.

B.

The Inadequacy Of Counsel As A Solution To Confrontation Problems.

The decision in *Wade* is not erroneous solely because it rests on a weak legal rationale. Its most grievous flaw is a practical one; it prescribes a solution that does not meet the problem.

In *Wade* the Court accepted two premises. The first was that eyewitness confrontations were subject to dangers and abuses. The second was that giving suspects a right to counsel at such confrontations would eliminate these dangers and abuses. Subsequent to the decision in *Wade*, there has been severe criticism of the second premise.[12] It has

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11. The pre-trial confrontation will be witnessed by several persons whereas the crime may only be witnessed by one or two, and the stress upon witnesses at the lineup is far less than it is at the crime.

12. e.g., ". . . the use of the lawyer at a lineup is a cumbersome and awkward mechanism for the correction of the kinds of lineup and confrontation abuses pointed out by the Court." Read, Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance, 17 U.C.L.A. L. Rev. 339, 341 (1969).

"Wade does not apply an appropriate poultice to the sore. Requiring counsel to be present at lineups is sim-

been persuasively argued that the right to counsel is an ineffective remedy for improper lineups. And these arguments have come from those who do not quarrel either with the initial premise that lineups may be subject to abuse or with the right of this Court to supervise state criminal procedure.

It appears from the opinions in *Wade-Gilbert* that counsel essentially serves no significant purpose at a lineup other than that of witness or observer. See *United States* v. *Gholston,* 437 F. 2d 260, 263 (6th Cir. 1971) and *Wright* v. *State,* 46 Wis. 2d 75, 175 N.W. 2d 646, 651 (1971).[13] Nearly every police regulation designed to implement *Wade-Gilbert* restricts the role of counsel to that of an observer. It is generally conceded, even by those who favor a broad application of *Wade,* that the police, and not counsel, are in charge of the identification procedure. See generally, Comment, Right to Counsel at Police Identification Proceedings, 29 U. Pitt. L. Rev. 65, 74-75, 87-88 (1967) (Guidelines developed by the Allegheny County Bar Association and the Pittsburgh Police); Read, Lawyers at Lineups, 17 U.C.L.A. L. Rev. 339, 395-407 (Examples of existing regulations).

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ply not the most effective method of combatting the evils that the opinion so effectively demonstrated do exist." id., at 363.

See also Note, Right to Counsel at Pre-Trial Lineup, 63 Nw. L. Rev. 251, 260 (1968); Note, Lawyers, 77 Yale L. J. 390, 392-93 (1967).

13. ". . . defense counsel required in Wade has no affirmative right to act; he is merely at the identification to observe and later recall his observations in the capacity of a witness at trial . . . a role requiring [no] legal expertise." Note, Right to Counsel at Pre-Trial Lineup, 63 Nw. L. Rev. 251, 259 (1968).

Indeed, it is difficult to imagine what counsel could be at a lineup other than an observer. He cannot be placed in charge of the lineup since he cannot, in keeping with his duty to his client, endeavor to assure a perfectly fair lineup. It would be his duty to devise a lineup in which identification of his client would be as difficult as possible. Counsel has no right to order or advise his client not to appear in a lineup under the doctrines of *Wade-Gilbert*, and, if he does so, his client may become very conspicuous, instead of less so.[14] He can make suggestions to the police to insure that the lineup will be fair, but the police can ignore his suggestions. And, it must be reiterated that counsel's suggestions ought to be directed not at making the lineup fair, but at making it weighted in favor of his client. Further, counsel confronted with a suggestive lineup is faced with a severe tactical problem if he represents (as is true in most cases) a guilty client and there may be a credible eyewitness. If the lineup is suggestive, it is hardly to his client's advantage for the lawyer to see that it is fair and thereby obviate his client's only chance to secure suppression of evidence. There is, to our knowledge, no existing contemporaneous objection rule at lineups, nor is there necessarily a court reporter to record such objections.

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14. In People v. Nelson, 40 Ill. 2d 146, 238 N.E. 2d 378 (1968), a pre-Wade case, defendant was allowed to phone his attorney prior to a lineup and was advised not to participate in the lineup. The lineup was held anyway, but defendant sat in a stairway adjacent to the lineup area and covered his face with his arms. The witness identified defendant anyway and the court affirmed, citing both the independent basis for the identification and the fact that suggestiveness at the lineup was the result of defendant's own actions.

It is, therefore, the presence of counsel as a witness that is supposed to eliminate the dangers and abuses sometimes occurring at lineups. There is good reason to doubt the effectiveness of such a role.

First, the lawyer can hardly "witness" deliberate misconduct that occurs outside the confrontation even though this submerged unfairness may well be more significant in the majority of cases. For example, the lawyer does not know what a policeman may have told the witness before the lineup, nor does he know whether the witness has covertly seen the defendant or his photograph previously. Nor can the lawyer "witness" innocent sources of unfairness such as the defects in the original basis of identification, e.g., poor lighting at the scene of the crime. Nor can the lawyer "witness" the vindictiveness of a witness. The lawyer may well learn of these through pretrial discovery or through cross-examination, yet these techniques were available prior to *Wade-Gilbert* and the presence of counsel at the lineup does not enhance their value. In simple terms, where faulty identification is due to circumstances out of the control of the police and inhering in the character of the witness and his capacity and opportunity to observe — the presence of a lawyer at a lineup serves no purpose. Where faulty identification is due to deliberate police abuse of the identification process, it is clear that the police have ample opportunity to employ effective suggestive methods outside the presence of counsel while adhering to the letter of the law, providing for the right to counsel.

In *Wade* the Court was, of course, concerned about the defendant's inability to reconstruct the lineup in order to attack it at trial. Professor Read analyzed this part

of the Court's opinion citing the Court's contentions and then gave this analysis:

"(a) *Those participating may be police officers.*

How will a lawyer's presence change this and is this an evil in and of itself? It must be remembered that the purpose of a lineup is to aid the police in investigating a crime. Certainly it must be conceded that police should be able to participate in their own investigative techniques.

(b) *The participants' names are rarely divulged.*

The obvious remedy is to require the names to be divulged. In the District of Columbia a "sheet" is routinely kept, listing the names of those participating in the lineup and the names of the conducting officers. The sheet is available to the defense.

(c) *The victim is not an effective witness as to what occurred.*

Neither is the defendant's lawyer. Audio and visual recording devices, photographs, and the like are much more effective. Even a lay observer, in the absence of such devices, would probably make a better witness than the defendant's lawyer. It is my view the jury would be much more likely to believe an independent observer than an accused's own attorney testfying on behalf of his client.

(d) *The victim's outrage may excite "vengeful or spiteful motives" and the victim will not be alert to conditions prejudicial to the suspect.*

A lawyer's presence will not change this. Only regularized lineup procedures that are faithfully followed can minimize suggestive procedures that may point the victim's outrage at the wrong person.

(e) *Neither witnesses nor lineup participants are alert for conditions "prejudicial" to the suspect or schooled in the detection of suggestive influence.*

A lawyer is not necessarily "schooled" in detecting suggestive influences either. A psychologist might be better equipped for the task. Even assuming the lawyer spots such conditions, what can he do about them except prepare himself to be a witness at trial? Certainly any impartial observer, acquainted with the problem and given examples of what to look for, could do as well as any lawyer. Better yet, since the purpose of a lawyer's presence is to acquaint judge and jury with what occurred, photographs, videotapes, or recordings would do this much more vividly. And adoption of regularized procedures might avoid suggestive conditions in the first place.

(f) *Jury will not believe a suspect's version of what occurred.*

Will it be much more likely to believe the suspects' lawyer's version of what occurred? Probably not. Therefore, objective reproduction by mechanical devices again will better counter this evil.[15]

The experience of one jurisdiction where the application of *Wade* was studied hardly sustains the heavy reliance this Court placed upon counsel at a lineup.[16]

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15. Read, Lawyers at Lineups, Constitutional Necessity or Avoidable Extravagance, 17 U.C.L.A. L. Rev. 339, 365-66 (footnotes omitted). To Prof. Read's first comment, we add that when police officers participate in a lineup it is probably easier to reconstruct it than if the fill-ins are taken from the local jail or lockup.

16. The District of Columbia has arranged for the presence of Legal Aid Attorneys at hearings. Prof. Read found that:

After studying that system Professor Read concluded:

"My observations and conversations with police, prosecuting attorneys and defense attorneys have convinced me that the lineup is a necessary tool in the arsenal of investigatory techniques available to the police. However, it is also my view that the pres-

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"Legal Aid seems to concede that under present conditions there is no real reason for defense counsel to appear at the lineup. First, except for minor alterations, the police will not change their set procedures. Second, there is no one there to record any objection that might be made. Legal Aid personnel seem generally to be of the opinion that the presence of an attorney at a lineup is simply not necessary if the attorney is to take a limited role."

and that:

"Experienced police officers and prosecuting attorneys are convinced that any discovery of a witness' name by some defense attorneys is tantamount to disclosure of that name to that lawyer's client. These same police officers and prosecuting attorneys feel that many prospective witnesses are refusing to participate in lineup procedures because of real fear of retaliation from the accused or friends of the accused once a witness' identity is discovered. A particularly sensitive situation evidently exists in the District of Columbia. It was reported that fear of physical intimidation seems especially acute among many Negro witnesses and victims of crime who are asked to cooperate with the police. Police officers charged that the real problem with the lineups is not that witnesses are too susceptible to suggestion but, on the contrary, witnesses are too reluctant to participate freely in the process. Several defense attorneys conceded that a serious problem of witness intimidation does exist and that Wade's command that a lawyer

ence of defense counsel at a lineup is simply not necessary to insure the fairness of the procedure. His passive role renders him basically impotent; he is unable to change the slightest detail in any way unless the police decide to cooperate; he is unable to make and have recorded any objections he may have; and he has no way of preserving what occurred except through his own notes and memory.

Not only is the defense lawyer's presence only minimally effective in preventing unfairness and preserving a record of what occurred, his presence, in certain cases, can actually hinder the administration of criminal justice. Some lawyers have turned the lineup, a police investigatory technique, into a discovery proceeding. A serious danger of intimidation exists in many cases when the identity of witnesses is discovered and disclosed to defendants. Furthermore, by

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be present at lineups may have exacerbated the situation.

Another vigorously raised complaint of police and prosecution attorneys relates to the conduct of defense counsel in altering the appearance of their clients prior to their client's participation in a lineup. For example, a young defendant may be arrested while sporting a mustache, an "Afro haircut" and very bright clothing. When he shows up for the lineup, his Afro haircut is removed, his mustache is shaved off, and he is wearing a suit and tie. An extreme example of this occurred when a female impersonator was arrested in his feminine disguise and then showed up for the lineup in typical male attire. The United States Attorney's Office thus feels that intimidation and disguise of suspects by defense lawyers is the "other side of the coin" from the suggestive influence problem."

Read, Lawyers at Lineups, 17 U.C.L.A. L. Rev. 339, 373-74 (footnotes omitted).

> drastically altering the appearance of defendants, defense counsel can actually nullify the usefulness of the lineup process as an investigatory tool. Wade was intended to protect an accused from suggestive lineup procedures; however, in certain cases, the real effect of the Wade remedy is to destroy the utility of the lineup procedure and to make intimidation of witnesses easier.[17]

Further, we reiterate, the imposition of a right to counsel puts a severe strain on the limited resources of the legal profession. If there is no corresponding benefit to the accused, and we have shown there is not, then there is no justification for imposing this heavy additional burden on the bar. "The use of lawyers primarily as professional witnesses would be an uneconomical use of a scarce talent." Note, Right to Counsel at Pre-Trial Lineup, 63 Nw. L. Rev. 251, 260 (1968).[18] Local jurisdictions might be able to assign a single attorney to serve at all lineups but, apart from the problem of denying a suspect counsel of his choice, these is doubt of the effectiveness of such counsel. In one case, counsel who witnessed several lineups had no personal recollection of the particular lineup in question and was hard pressed to remember whether or not he represented the defen-

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17. Read, Lawyers at Lineups, 17 U.C.L.A. L. Rev. 339, 374-75 (footnotes omitted). It should be borne in mind that Prof. Read's strictures come from a lawyer who is in basic agreement with the Court's purpose in extending federal constitutional review to lineup procedures. 17 U.C.L.A. L. Rev. at 363.

18. "Lawyers are trained to 'defend' in an adversary proceeding . . . it is simply a waste of their time and talents to employ them as passive observers." Read, Lawyers at Lineups, 17 U.C.L.A. L. Rev. 339, 378.

dant. See *United States* v. *Randolph*, 443 F. 2d 729, 731-34 (D.C. Cir. 1970).

Finally, even if counsel is thought to diminish unfairness by virtue only of his presence as a witness, the imposition of a right to counsel at lineups is still unjustified. It is unjustified because counsel do not serve well as witnesses. They are prohibited by disciplinary rules from appearing as witnesses for their clients. See DR 5-102, Code of Professional Responsibility of the American Bar Association (and DR 5-102 of the Illinois Code of Professional Responsibility). And a lawyer is hardly to be regarded as fully credible when his testimony serves the party he represents. More importantly, if one assumes that the presence of counsel will be effective in deterring unfair lineups, then some extremely undesirable consequences will ensue. That is, defense counsel may be called to testify against his client. What the lawyer observes at the lineup is not privileged. See 8 Wigmore, Evidence, Section 2292 (McNaughten Rev. 1961); *State* v. *Funicello*, 49 N.J. 553, 231 A. 2d 579, 596-97 (1967), *cert. den.* 390 U.S. 911. If the lawyer has suggested modifications at the lineup and the police have complied with these suggestions, there is no reason why the prosecution cannot bring these facts into evidence to support the fairness of the police and the reliability of the identification. The lawyer may be called to testify if he or his client insists on filing a motion to suppress identification evidence. The lawyer may even be called at trial in those jurisdictions where the witnesses to a pre-trial identification by a victim may testify about that identification.[19]

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19. People v. Gould, 54 Cal. 2d 621, 354 P. 2d 856 (1960); Johnson v. State, 237 Md. 283, 206 A. 2d 138 (1965); Commonwealth v. Johnson, 201 Pa. Super. 448, 193 A. 2d 833 (1963); State v. Simmons, 63 Wash. 2d 17, 385 P. 2d 389 (1963).

See *People* v. *Dozier*, 22 Mich. App. 528, 177 N.W. 2d 694 (1970).

The lawyer who does testify against his client (or who merely contradicts his client's story in some respects) will destroy any relationship of trust between him and his client. The same is true of a lawyer who refuses his client's demand to attack an identification procedure because he personally observed its fairness. Such a lawyer is certain to be subjected to charges of incompetency and betrayal if his client is convicted. In sum, a lawyer cannot serve as both counsel and witness to a lineup, and this conflict in roles is more severe if counsel succeeds in securing a fair lineup than if he fails.

The petitioner may answer that if counsel at lineups is undesirable, than the Court in *Wade* gave the states an alternative which they should have employed. It is true that the opinion in *Wade* did state, "Legislative or other regulations, such as those of local police departments, which eliminate the risk of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as "critical", *United States* v. *Wade*, 388 U.S. at 239. Yet, that language was explicitly disavowed by four of six Justices joining in the opinion. *United States* v. *Wade*, 388 U.S. at 246-47 (Black, J.) and 388 U.S. at 262 (Fortas, J. joined by Warren, C.J. and Douglas J.). A fifth Justice implicitly rejected the proposition. *United States* v. *Wade*, 388 U.S. at 245 (Clark, J.). Essentially only one Justice was committed to the notion that regulations may render a lineup non-critical, and the operative word was "may", not "will". This is a slender reed on which to found an argument that the states have an alternative. No state could reasonably be expected to risk the integrity of its

criminal process by adopting an alternative to counsel. And even if the possibility of valid alternatives were clear — it would not be reasonable to expect a state to operate for two or three years under a system it can only hope will win final court approval under the vague guidelines given in *Wade*.[20] The suggestion of an alternative to counsel is, at best, far too tentative and, at worst, illusory.

In the trilogy of eyewitness identification cases, *Wade, Gilbert* and *Stovall,* this Court evinced its concern with eyewitness identification procedures. The Court perceived the existence of a problem. Yet, instead of solving or attempting to solve the problem by regulating lineups, the Court literally threw counsel into the breach. The Court apparently expected counsel to provide solutions to the problems of unfair lineups. This expectation was unjustified. Furthermore, counsel are not better qualified than the court to determine rules for fair lineups and are not, in any event, empowered to order changes in police procedure. Most importantly, it is not the duty of counsel to insure fairness. Assuming that defense counsel was both qualified and authorized to make changes in lineup procedures, counsel would be obliged to exercise both his

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20. The only attempt to rely on the suggestion that regulations might obviate the right to counsel has been rebuffed with the reasoning that such regulations would be adequate only if they succeeded in elevating eyewitness identification procedures to the level of reliability present in procedures for analyzing fingerprints, blood samples and hair. See People v. Fowler, 1 Cal. 3d 355, 461 P. 2d 643, 652 (1969). If this is the standard to be met by legislation or regulation, then acceptable regulation is impossible. It is, in fact, difficult to see how the right to counsel can succeed in elevating eyewitness identification to the level of scientific reliability.

skill and his authority in the service of his client, and not in the service of fairness.

It is our view that the explicit holding in *Stovall* that federal and state courts were empowered to examine pre-trial confrontations to determine whether they were so unnecessarily suggestive as to violate due process is an adequate solution to whatever problems arise at line-ups. The power of courts to exclude evidence obtained by suggestive confrontations is surely a sufficient remedy for anyone aggrieved by such a confrontation. The power of courts to review pre-trial confrontation practices allows the courts to develop, on a case-by-case basis if necessary, rules to govern lineups. By overruling *Wade*, this Court will *not* put out of the reach of federal courts serious questions of fairness of pre-trial confrontations.[21]

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21. In truth, from the point of view of the prosecutor Stovall is far more significant a case than Wade. This is true because as a practical matter only the application of Stovall can cause the loss of the entire testimony of a witness. The worst consequence of a violation of Wade-Gilbert is the suppression of evidence of a pre-trial identification by a witness.

To illustrate this, assume a case arising this year where a defendant is placed in a line-up without waiving counsel. Wade-Gilbert has been violated. But assume that the line-up is perfectly fair, consisting of seven men of the same height, hair color, race and general appearance, all similarly dressed. If the victim identifies the defendant, the victim will not be able to testify concerning the line-up. But the witness will be able to make a courtroom identification because it is clear that a perfectly fair line-up could not have tainted the courtroom identification. See Nielsen v. State, 456 S.W. 2d 928 (Texas 1970). Indeed, the fairness of the line-up itself, coupled with a positive identification, is clear and convincing evidence that the wit-

The insertion of counsel into a role which he has neither the capacity, authority or ethical obligation to fulfill adequately represents a misstep by this Court. If the error in this Court's decision could not have been seen in June of 1967 — it can be clearly seen today. If this Court still believes that the problem of suggestive lineups is a serious one meriting federal intervention, then the Court is fully able to adopt direct and meaningful regulations. In any event, this Court ought to overrule *Wade* and allow counsel to return to his role as advocate for his client and abandon his ill-conceived role as a "neutral" witness and "presence" at police lineups.

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ness had a strong basis for identification prior to the line-up. The ease with which a court can sustain an identification when the pre-trial procedures have been exemplary is found in Butler v. State, 226 Ga. 56, 172 S.E. 2d 399 (1970). It is apparent from this example that the existence of a Stovall violation is of far greater consequence than a Wade-Gilbert violation. The former tends to impugn the integrity of the witness' courtroom identification while the latter does not. In those jurisdictions where the prosecution is prohibited from showing that a witness made a prior identification the effect of Wade-Gilbert alone is negligible. See 4 Wigmore, Evidence, Sec. 1130 (3rd Ed. 1940); 71 A.L.R. 2d 449; Clemons v. United States, 408 F. 2d 1230, 1242-43 (D.C. Cir. 1968), cert. denied 394 U.S. 964; Prideaux v. State, 473 P. 2d 327 (Okla. 1970). In those jurisdictions where evidence of pre-trial identification is admissible, a Wade-Gilbert violation has some strategic effect because the fact that a line-up was conducted and the witness did identify the defendant is helpful, though not essential, to the prosecution.

CONCLUSION

For the reasons stated the State of Illinois respectfully requests that the judgment of the Appellate Court of Illinois, First District, be affirmed.

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